





and there exists a substantial probability that death, serious physical injury, debilitation, or disease will imminently ensue unless the person receives prompt adequate treatment. Wis. Stat. § 51.20(1)(a). The individual in question must be mentally ill, developmentally disabled, or drug dependent, capable of rehabilitation, and dangerous as defined by statute. *Id.*

► **Note.** A proper subject for treatment must mean there are techniques that can be employed to bring about rehabilitation from the condition. *Fond du Lac Cnty. v. Helen E.F. (In re Mental Commitment of Helen E.F.)*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179.

A minor may also be the subject of a voluntary commitment, though not without the consent of a parent or guardian. Wis. Stat. §§ 51.13, 51.61(6). If the child is under the age of 14, the minor is not required to consent, only the parent or guardian. If the child does make a statement or exhibit conduct that indicates the minor does not agree to the admission to the facility, it must be noted on the face of the application. Wis. Stat. § 51.13(1)(a). If the minor is age 14 or older, the minor and parent must consent to the voluntary commitment. Wis. Stat. § 51.13(1)(b). The only exception to requiring parental consent for voluntary treatment is for minors 12 years old or older seeking treatment for abuse of alcohol or other drugs. Wis. Stat. § 51.47(1).

Involuntary civil commitments of minors can be initiated in three ways: (1) an individual who was voluntarily admitted to a treatment facility is later denied their request for discharge, (2) a petition for civil commitment is prepared by the county corporation counsel and signed by three adults (also known as a three-party petition), or (3) a law enforcement officer detains an individual on the basis of observed behavior or reliable witness accounts. Wis. Stat. § 51.13 (specifically regarding minors, referencing Wis. Stat. §§ 51.15, 51.20, 51.45). All three types of involuntary commitment require an emergency detention petition be filed with the circuit court. The emergency detention petition then forms the basis for a probable cause hearing.

The quickest route to initiate commitment proceedings is through law enforcement emergency detention. Law enforcement officers may do an emergency detention of individuals alleged to be mentally ill when the subject poses a significant risk to themselves or others as established by behavior observed by the officer or reliable witness accounts. The officer must file a statement detailing the basis for detention, identify any witnesses to the behavior, and allege that the officer believes the individual meets the criteria for commitment. Wis. Stat. § 51.15(1), (2), (5).

A three-party petition for examination requires three adults to sign the petition for involuntary commitment. The petition must state a belief that the subject of the petition is mentally ill and in need of treatment and support it with specific examples of statements or acts by the individual to support that belief. The petition must indicate a concern that the subject is a danger to themselves or others, including threats or attempts at suicide. For a sample form for the three-party petition, see *Marathon Cnty., Questionnaire-Mental Illness*, <https://www.co.marathon.wi.us/Portals/0/Departments/CRP/Documents/3PartyPetitionMIQuestionnaire.pdf> (last visited May 6, 2021).

Once a civil commitment proceeding is initiated, there are two court hearings to complete the action. The first hearing, known as the probable cause hearing, must be held within 72 hours after the petition is filed. Wis. Stat. § 51.20(7). A probable cause hearing requires the subject of the action to be detained and transported to a facility until the hearing. The petitioner must testify before the court and may be cross-examined by the subject's attorney. If probable cause is found after the hearing, the subject will be evaluated by court-appointed examiners and wait in a facility for the second hearing, known as the final hearing.



The final hearing usually occurs within 14 days after the probable cause hearing. Wis. Stat. § 51.20(9), (10), (13)(e). The final hearing may be a jury trial and, in the case of a three-party petition, include testimony from all three petitioners. After the final hearing, if the subject is committed, they must be treated in the least restrictive environment consistent with their needs. For some minors, this may include return to the parent or guardian for outpatient care, though there is no minimum commitment time a court is required to order for inpatient treatment. The initial order for commitment cannot exceed six months. Renewal orders cannot exceed one year.

#### IV. Confidentiality and Release of Records—Limits and Concerns [§ 5.8]

##### A. In General [§ 5.9]

Minors are the subject of a variety of records that may be at issue in the course of representation in civil and criminal court and even in cases in which the minor is not a party to the case directly. Different types of records are subject to different laws and are protected differently.

##### B. School Records [§ 5.10]

Educational records are protected by both federal and state law. 20 U.S.C. § 1232g; Wis. Stat. § 118.125. The Family Educational Rights and Privacy Act, commonly known as FERPA, protects a minor from the school disclosing educational records to someone other than the minor's parent or guardian until the minor reaches the age of majority. 20 U.S.C. § 1232g. Educational records can be requested by the court system for civil or criminal proceedings.

FERPA protects the release of the pupil records from general disclosure, but schools can disclose the records without written consent in certain circumstances, including if the disclosure is to comply with a judicial order or lawful subpoena, is in connection to a health or safety emergency, or is to state and local authorities within the juvenile justice system as required by state law. 34 C.F.R. § 99.31. A subpoena is only sufficient for release of pupil records for law enforcement purposes and does not include a subpoena issued by a defendant in a criminal case. 20 U.S.C. § 1232g(b)(1)(J)(ii); Wis. Stat. § 118.125(2)(q)3.

The records can be released for review by a court prior to release to the state and defense in a criminal proceeding in response to a subpoena from a defendant in some circumstances. Wisconsin courts have not interpreted the federal statute, but courts interpreting FERPA have held that a defendant in a criminal case must first make some showing of need before issuing a subpoena. 20 U.S.C. § 1232g(b)(2)(B); *People v. Bachofer*, 192 P.3d 454, 460 (Colo. App. 2008); *Zaal v. State*, 602 A.2d 1247 (Md. 1992).

Interestingly, FERPA does not specifically allow minors who are separated from their parents the rights normally afforded to the parents and otherwise eligible students. 34 C.F.R. § 99.5(b); U.S. Dep't of Educ., *Frequently Asked Questions*, <https://studentprivacy.ed.gov/frequently-asked-questions> (last visited May 6, 2021). Schools may use their discretion in determining whether an unaccompanied minor is responsible enough to exercise the privileges afforded under FERPA, such as reviewing records and consenting to their disclosure.

##### C. Medical Records [§ 5.11]

Generally, medical records for adults and minors alike are protected by the Health Insurance Portability and Accountability Act (HIPAA). 42 U.S.C. § 1320d. HIPAA is a federal act intended to